



December 2, 2014

Joan Matthews, Director, Clean Water Division
U.S. Environmental Protection Agency Region II
Clean Water Division
290 Broadway
New York, NY 10007-1866

Via email to Matthews.Joan@epa.gov

Re: EPA Region II's Oversight of New Jersey Municipal Separate Storm Sewer
System (MS4) Permits

Dear Ms. Matthews:

Thank you for meeting with representatives of our organizations on October 6, 2014 to discuss the upcoming renewal of New Jersey's municipal separate storm sewer system (MS4) general permits. We appreciated the opportunity to learn about your office's interactions thus far with the New Jersey Department of Environmental Protection (NJDEP) about the permit renewals, and to discuss the concerns we have raised with NJDEP about the deficiencies of the state's current permits.

As we discussed at the meeting, we strongly urge Region II to fulfill its obligations to ensure that New Jersey's reissued permits are legally sound. Our February 2014 petition to modify (or revoke and reissue) NJDEP's four statewide MS4 general permits explains, in great detail, the permit revisions we believe are necessary to comply with the Clean Water Act (CWA). The petition is attached to this letter for your reference.

We are encouraged that we found common ground with Region II on several issues during the meeting. First, we agreed that green infrastructure practices are a critical component of any stormwater permit and are necessary to comply with the CWA's maximum extent practicable (MEP) standard. Second, we agreed that, like other types of stormwater infrastructure, green infrastructure practices used to satisfy CWA requirements must be

inventoried and maintained in a comprehensive, robust fashion. Third, we agreed that permittees' notices of intent and stormwater management programs must be made available to the public for comment and an opportunity for hearings. Fourth, we shared the conviction that MS4 permits must contain more concrete and specific requirements designed to achieve total maximum daily load (TMDL) wasteload allocations (WLAs) in accordance with a set timetable. Providing that permittees subject to TMDLs "may" be required to adopt additional measures is not sufficient. Nor is a "baby step" approach to making unquantified progress toward hoped-for compliance with water quality standards on an unspecified timeline.

In connection with the latter issue, we discussed whether MS4 permits can contain "schedules of compliance" for WLA attainment, as necessary to comply with water quality standards (WQS) adopted before 1977, consistent with the Environmental Appeals Board's decision in *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172 (1990). New Jersey's CWA implementing regulations allow "compliance schedules" only for effluent limitations based on water quality criteria adopted or revised after 1977. N.J.A.C. 7:9B-1.5(e)(6). We noted that, in order to attain pre-1977 WQS, some MS4 permits have taken the alternative approach of requiring permittees to develop enforceable "implementation plans" or "restoration plans" that set forth a timetable of actions and reductions leading to WLA compliance. Examples of such permits include individual permits for Washington, DC and Arlington, Virginia, and general permits for Vermont, Georgia, and Pennsylvania. These permits are attached to this letter for your reference.

We appreciated the opportunity following the meeting to review the evaluation of New Jersey MS4 permits that was performed by Tetra Tech for Region II. This evaluation echoes many of the concerns that our groups have raised both in our petition to NJDEP and elsewhere. In addition to reiterating many of the points of agreement discussed during our meeting, described above, the Tetra Tech report indicates that we also concur with Region II on the need for other permit improvements, such as permitting authority review of permittee-developed pollution control programs, such as SPPPs; monitoring requirements to assess stormwater WLA implementation; and a more stringent post-construction standard that lowers the applicability threshold and requires on-site retention of a specific storm event volume.

On the subject of post-construction standards, we were encouraged to hear that EPA understands the importance of NJDEP's ongoing revisions to its stormwater regulations for development sites, as the MS4 permits rely on these regulations in order to satisfy the Clean Water Act MEP standard for post-construction runoff from new development and redevelopment sites. It is clear that the state's current regulations are woefully inadequate to meet that standard or to protect water quality in New Jersey. We hope that EPA will work with NJDEP to ensure that the new regulations are completed quickly, so that the new MS4 permits do not fall short of the MEP standard by relying on the old, insufficient regulations. We also hope that Region II will work with NJDEP to ensure that the new regulations are comprehensive and strong enough to achieve pollution reductions to the maximum extent practicable. NJDEP has informed stakeholders that it plans to adopt a new regulatory approach based on limiting "effective" impervious surface. EPA should help NJDEP craft the new standards carefully so that they are designed to achieve the maximum practicable reductions in pollutant loadings. We have significant concerns with some aspects of NJDEP's intended approach, which we are detailing for NJDEP and will share with EPA as well.

Finally, we take this opportunity to reiterate the need for Region II to take a firmer stance on the need for compliance with water quality standards even in the absence of a TMDL. The Tetra Tech permit evaluation is silent on this point, and though we discussed it during our October meeting, we did not reach agreement. Compliance with WQS is a mandatory component of all NPDES permits. Accordingly, other EPA regions have integrated a narrative requirement to comply with WQS into MS4 permits, such as the draft permit for New Hampshire proposed last year by Region I.¹ In Region III, Pennsylvania recently entered into a settlement agreement (attached to this letter) that commits the state to requiring, in its next general permit term, that MS4s develop and implement plans to address their contributions to nutrient and sediment impairments even in the absence of a TMDL. We urge Region II to take a similarly strong position on the issue, along with the other permit defects mentioned above, in accordance with its oversight role under the CWA.

It is well within EPA's authority to ensure that state-issued National Pollutant Discharge Elimination System (NPDES) permits, such as MS4 permits, comply with all Clean Water Act requirements. In fact, EPA has a duty to ensure that delegated states are implementing federal laws and regulations appropriately. EPA's Clean Water Act regulations, 44 C.F.R. § 123.44, provide that any Regional Administrator may make general comments upon, objections to, or recommendations with respect to proposed NPDES permits. Objections to a proposed permit may be issued if the permit fails to apply, or to ensure compliance with, any applicable requirement of the Act or implementing regulations. An objection is to contain a statement of the reasons for the objection and the actions that must be taken by the state's NPDES program director to eliminate the objection, including the effluent limitations and conditions that the permit would include if it were issued by the Regional Administrator.

Other EPA Regions frequently exercise their authority to object to state-issued MS4 permits that fall short of legal requirements. For example, we are aware of at least the specific objections and "pre-objection" comments from Regions III, IV, and IX that are attached to this letter, all of which were issued in the last few years. Those other Regions have used their authority to comment on or object to issues that also arise in the context of New Jersey's stormwater permits. All of the attached documents emphasize the need for MS4 permits to contain pollution limits and associated timetables or schedules as necessary to address applicable TMDL WLAs. Region III specifically objects to the failure of the Maryland and Virginia permits at issue to explicitly prohibit discharges that cause exceedances of water quality standards. The Region IV and IX letters stress the importance of including measurable, enforceable requirements to use green infrastructure or low impact development (LID) techniques in order to meet the Clean Water Act's MEP standard. Region IV's comments highlight the importance of monitoring and assessment of pollution reductions. And Region III's objections underscore the legal necessity of subjecting permittee-developed plans and schedules to permitting authority review.

Region II should follow the examples set by these other Regions and use its authority as needed to enforce the mandates of the Clean Water Act and protect New Jersey's waters from further degradation. The precedents set by the other objection and comment letters described

¹ <http://www.epa.gov/region1/npdes/stormwater/nh/2013/NHMS4-NewDraftPermit-2013.pdf>.

above make clear that Region II would be justified in taking action if NJDEP proposes to issue permits that contain the same defects as the permits currently in effect. Moreover, the examples described above show that issuing specific objections to permits can often result in positive changes, such as in Maryland, where the state strengthened certain permit language relating to water quality standards following Region III's intervention.

We look forward to working with Region II, along with NJDEP, to develop a new round of MS4 permits that meet all legal requirements and advance the state of stormwater management in New Jersey. If you have any questions or wish to discuss these matters further, please do not hesitate to contact Larry Levine (llevine@nrdc.org) or Rebecca Hammer (rhammer@nrdc.org) at NRDC.

Sincerely,

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